

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL -5 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0169-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAMIEN LAMONT BECK,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2003020990001DT

Honorable Connie Contes, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch

Phoenix
Attorneys for Respondent

Damien Beck

Tucson
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 In connection with the robbery of a credit union, petitioner Damien Beck was convicted after a jury trial in 2004 of six counts of armed robbery and seven counts of kidnapping, all dangerous offenses. The convictions and the prison terms imposed

were affirmed on appeal. *State v. Beck*, No. 1 CA-CR 2004-0422 (memorandum decision filed Feb. 28, 2006). Beck filed a notice of post-conviction relief in November 2006, followed by a petition in which he raised a claim of actual innocence pursuant to Rule 32.1(h), Ariz. R. Crim. P. Beck attached to his petition an affidavit of co-defendant Myron Porter, who was convicted of offenses related to the robbery pursuant to a plea agreement and sentenced after Beck's trial. The trial court denied relief after an evidentiary hearing on June 20, 2008, at which Porter testified, and denied Beck's motion for rehearing. This petition for review followed.

¶2 It is the defendant's burden to prove by a preponderance of the evidence all factual allegations raised in his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.8(c). Having raised a claim pursuant to Rule 32.1(h), Beck was required to "demonstrate[] by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found [him] guilty of the underlying offense[s] beyond a reasonable doubt." In reviewing a trial court's ruling after an evidentiary hearing, we defer to that court with respect to its assessment of the witnesses' credibility and its resolution of any conflicts in the evidence. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). We are ever mindful that the trial court "is in the best position to evaluate credibility and accuracy, as well as draw inferences, [and] weigh, and balance" the evidence presented at the evidentiary hearing. *See State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000), quoting *State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993). Consequently, we do not reweigh the evidence. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) (appellate court reviews evidence at post-conviction-relief hearing favorable to trial court's ruling and defers to trial court in resolving conflicts in

evidence). Rather, “[w]e examine a trial court’s findings of fact after an evidentiary hearing to determine if they are clearly erroneous.” *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994).

¶3 In denying relief, the trial court stated it was “not persuaded by the affidavit and testimony of co-Defendant Myron Porter, especially where [he] contends that he does not know the last name of, and has not otherwise identified, his accomplice with whom he entered the credit union on September 8, 2003.” Expressly finding Porter not credible, the court denied relief. On review, Beck challenges his sentences, claiming his “Fifth Amendment” rights were violated by the court’s imposition of multiple punishments for the same offense and its imposition of aggravated prison terms. He also contends he raised a “colorable claim” for relief under Rule 32.1(h) and that the court erred by not granting him relief on that basis.

¶4 We will not address Beck’s challenges to the sentences. First, we do not address claims raised for the first time in a petition for review.¹ *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). Second, any challenges to the sentences are, in any event, precluded because they were raised or could have been raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). With respect to Beck’s contention that he raised a colorable claim for relief pursuant to Rule 32.1(h), we agree, as did the trial court, which granted Beck an evidentiary hearing for that reason. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (defendant entitled to evidentiary hearing if claim raised in Rule 32 petition colorable). But it was Beck’s

¹To the extent Beck has raised other claims in his petition for review that were not presented to the trial court first, we refuse to address them as well. For example, he seems to argue his due process rights were violated when the victims identified him. Nor are we required to review the record on review for “structural” or fundamental error, as Beck seems to suggest. *See State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996).

burden to prove the factual allegations in his petition at that hearing. Ariz. R. Crim. P. 32.8(c). The court found he had failed to sustain his burden and in challenging that ruling on review, Beck essentially asks us to reweigh the evidence. But as we have made clear, we do not reweigh the evidence; we defer to the trial court with respect to its assessment of a witness's credibility. *See Fritz*, 157 Ariz. at 141, 755 P.2d at 446; *see also Sasak*, 178 Ariz. at 186, 871 P.2d at 733. And given that Porter's credibility was at the heart of Beck's claim of actual innocence, we have no basis for disturbing the court's ruling.

¶5 Beck has not sustained his burden on review of establishing the trial court abused its discretion by denying relief. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007) ("We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion.").

¶6 We grant his petition for review but deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge